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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 464

GAINESVILLE UTILITIES DEPARTMENT, CITY OF GAINESVILLE, FLORIDA,

Petitioners,

v.

FLORIDA POWER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. II 489-503)[1] is reported at 425 F.2d 1196. The main opinion and opinion on rehearing of the Federal Power Commission (R. I 352-381, 409-417) are reported at 40 FPC 1227 and 41 FPC 4, respectively.

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[1]The printed record before this Court consists of:

(a) A joint appendix volume printed for use before the Court below. This volume is cited as R. I.

(b) An oversized volume of exhibits submitted in the Court below pursuant to Rule 30(e) of the Federal Rules of Appellate Procedure.

(continued)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 1, 1970 (R. II 504). This Court granted certiorari on October 26, 1970 (R. II 505). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

STATUTE INVOLVED

The pertinent provisions of Section 202 of the Federal Power Act, 49 Stat. 847, as amended, 16 U.S.C. 824a are set out in the Appendix, *infra*, pp. 39-40.

QUESTION PRESENTED

Whether, in directing a large interconnected electric utility to interconnect with a smaller system under Section 202(b) of the Federal Power Act, the Federal Power Commission erred in not including, in the "compensation * * * reasonably due" to such large system, an allowance for net benefits received by the smaller system as a result of the interconnection, in addition to reimbursement for costs incurred by the large system.

Each of the exhibits included is marked by a margin Tab to help locate it. Citations to these exhibits are by exhibit numbers.

(c) A supplemental volume including additional excerpts from the record before the Commission, together with (1) a list of relevant docket entries, (2) the opinion and judgment below, and (3) this Court's order granting certiorari. This volume is cited as R. II.

STATEMENT OF THE CASE

Pursuant to the complaint filed by Gainesville Utilities Department and the City of Gainesville, Florida[2] the Federal Power Commission ("Commission") by order issued under Section 202(b) of the Federal Power Act, App., *infra*, pp. 39-40, directed Florida Power Corporation ("Florida Power"), a "public utility" subject to Commission regulation under that Act, to establish physical connection with facilities of Gainesville, a municipally-owned electric system, and to sell to, and exchange energy with, Gainesville upon terms and conditions prescribed in that order, Gainesville to provide or pay for all interconnecting facilities. On appeal filed by Florida Power, the Court of Appeals affirmed the order of interconnection but set aside provisions as to compensation due to Florida Power on the ground that the Commission's failure to include therein an allowance for benefits received by Gainesville, in addition to reimbursement for costs incurred by Florida Power, was based on incorrect and unsound policy. The pertinent facts may be summarized as follows:[3]

Florida Power is the second largest electric utility in Florida and serves a 32-county territory in west and central Florida some 350 miles in extent. It had a peak load in 1965 of 1003 megawatts[4] (mw) occurring in the winter and a generating capability of 1354 mw (Exhibit 96, Sheet 5).[4a]

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[2]Collectively referred to as Gainesville.

[3]Since there is no issue presented in the instant proceeding with regard to the Court of Appeals' rulings (1) that Gainesville is a "person" entitled to seek relief under Section 202(b), and (2) that the Commission properly declined to require Gainesville to agree to a division of retail service areas as a condition to the interconnection, references to these matters, which occupied a substantial part of the attention of the Commission and the Court of Appeals, have been kept to a minimum.

[4]A megawatt is the equivalent of 1000 kilowatts (kw) or 1,000,000 watts.

[4a]The statistics in the record reflect operations for the year 1965 or, in some cases, 1966 (R. I 354, fn. 1).

Florida Power is interconnected with the Georgia (Georgia Power Company) and Florida (Gulf Power Company) affiliates of the Southern holding company system for the mutually advantageous use and exchange of power and for emergency purposes (R. I 317).

Florida Power is a member of an interconnected group of five electric utilities in Florida[5] which operate in parallel with a free flow of electricity over their transmission systems. They thereby coordinate the operation and maintenance of generating units and deliver large blocks of energy to each other during emergencies (R. I 316). Interconnected operations also are coordinated through the Florida Operating Committee, composed of representatives of the five utilities. The Committee establishes the operating reserves requirement for the group as a whole, and apportions responsibility therefore to each utility through a uniform formula[6] (R. I 316). These operating reserves are automatically brought into generation to supply power to the interconnected transmission system whenever an emergency occurs,

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[5]This interconnected group consists of:

Name	1965 peak customer load:
City of Orlando	180.0 MW
City of Jacksonville	506.7 MW
Tampa Electric Company	726.0 MW
Florida Power Corporation	1003.0 MW
Florida Power & Light Company	2529.0 MW

(Exhibit 96, sheet 5)

[6]The group must keep a total "ready reserve" (generating capacity available within ten minutes) of one and one-half times the largest unit operating on the interconnected systems. Of this ready reserve, two-thirds must be "spinning reserves" (reserve capacity actually spinning on the line and available to take load immediately) so that there are always available spinning reserves equal to the capacity of the largest generating unit operating. The allocation formula pro-rates responsibility for these reserves on the basis of comparative customer peaks and largest units of each utility (R. I 164). See Committee minutes in Exhibit No. N-132 for detailed studies of operations and criteria.

such as the forced outage of a generating unit, requiring an instantaneous increase in energy flow to any individual system; and these operating reserves thereby stabilize the interconnected electric operations.

Each of the 5 utilities is enabled by their interconnected operations to install larger, more efficient generating units and to carry smaller installed reserves than if they were operating in isolation (R. I 317). In addition, Florida Power has made separate contracts with Tampa and Orlando for the purchase of firm power to coordinate installation and maintenance of units utilizing the interconnected Florida transmission system (R. I 317).

Gainesville owns and operates an isolated electric utility serving a population of some 60,000 in and about the City, some two-thirds of the population of rural Alachua County in Central Florida. Its peak load, which occurs in the summer, was 51 mw in 1965 (R. I 354). Its load is growing at the rapid compound rate of 15% per year, doubling every five years, which is twice the national average growth rate, and its 1970 peak was anticipated as 102 mw (R. I 354). It is thus under constant pressure to expand its generation through construction of the largest, most economical units possible. In 1965 its total generating capacity was 108 mw (R. I 354).[7]

Gainesville desired to interconnect with the Florida transmission grid in order to obtain the economies and other interconnection benefits available to members of the Florida interconnected group, subject to bearing its share of pool burdens. It was unable to negotiate a satisfactory interconnection agreement with either Florida Power or Florida

[7]Pending the outcome of this case, Gainesville continued to expand on an isolated basis. It has now installed three 15-mw gas turbine generators and is constructing 81 mw steam generator for 1972 operations, after which it will have total capability of 234 mw. Its 1970 peak was 96 mw.

Power & Light Company.[8] In 1965, it applied to the Commission for an order under Section 202(b), App., *infra*, pp. 39-40, directing Florida Power to interconnect, Gainesville proposing to construct 15 miles of transmission line to absorb the full cost of the interconnecting facilities. Gainesville also alleged unlawful discrimination and preference by Florida Power under Sections 205 and 206 of the Act.

Following extensive hearings, the Presiding Examiner issued his Initial Decision (R. I 313-341), in which he required both utilities to interconnect and provide emergency services to each other up to the full 60 mw capacity of the interconnecting facilities. He found, *inter alia*, that (R. I 321):

> "Witnesses for Gainesville, Florida Power and Staff are in agreement that the proposed interconnection is desirable and in the public interest. * * * If Gainesville were to maintain its isolated status it would be required to install duplicating additional generation of its own in order to assure its customers of firm service, although not without some curtailment because of reduction in frequency in the event of loss of its largest unit. Independent maintenance of sufficient installed capacity (fn. omitted) to carry peak-hour load in the event of an outage, to the extent of the loss of Gainesville's largest unit, would surfeit the area with capacity far in excess of the amount necessary at any one time, an obviously wasteful and uneconomic process."

The Initial Decision would require Gainesville to maintain spinning and ready reserves in accordance with procedures established by the Florida Operating Committee (R. I 339) and to maintain minimum installed reserves based upon the criteria of the Florida interconnected group.

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[8]Gainesville had also sought an interconnection with Florida Power & Light Co. as well as Florida Power (R. I 56, 276; Certified Record pp. 1480-81).

In fixing the schedule of charges to be made for services provided under the interconnection, the Examiner declined to allow the $3.08 per kw per year standby charge, i.e., for allegedly keeping facilities available to provide "instantaneous" emergency service, pressed by Florida Power for emergency back-up service, but provided instead for a splitting of the operating benefits resulting from the interconnection (R. I 333, 340).

In its Opinion and accompanying order here under review (R. I 352-381, 409-417) the Commission found with regard to the interconnection itself (R. I 357):

> "* * * this record affirmatively shows that the proposed interconnection between [Florida Power] and Gainesville is desirable and in the public interest. Each system will gain financial and engineering benefits from the interconnection. The record also shows that the ordered interconnection will not place an undue burden upon Florida Power, will not require [Florida Power] to enlarge its generating facilities, and will not impair Florida Power's ability to render adequate service to its customers."

As to the claimed standby charge, the Commission held (R. I 364):

> "* * * the record in this proceeding does not establish any satisfactory justification for the imposition of [the $3.08 per kw per year] * * * demand charge as requested by Florida Power. We are also of the opinion that the 50-50 split proposal of the Examiner is not appropriate."

In this regard, the Commission stated as a general proposition that:

> "* * * whenever two electric systems with generating capacity undertake to interconnect and operate in parallel it is necessary for them to consider the nature of their respective electrical resources and individual system utility responsibilities, both as a means of evaluating the particular services to be rendered between the connecting systems and in

> order to ensure that appropriate compensation is afforded, either through service exchanges or financial payments. Marked disparities between two (or more) systems in the reliance placed upon the network should be reflected in the terms and conditions of the interconnection arrangement through appropriate provisions. Each participant should bear its proportionate share of that responsibility. In our judgment, a prerequisite to viable and effective interconnected operations among all electric systems is an equitable sharing of the responsibilities of interconnected operation. Each participant should bear its proportionate share of that responsibility. In doing so, each interconnecting system will meet its utility responsibilities and there will be no economic penalties for being the last one on the interconnected network." (R. I 358).

The Commission pointed out that "Gainesville has agreed to absorb the entire cost of the facilities needed for the proposed interconnection" without any "direct cost to Florida Power" (R. I 361, 368), and further that "neither Florida Power nor Gainesville is being directed to provide any specific firm power service to the other" (R. I 363, fn. 4). Then applying its rationale to this case the Commission recognized that Gainesville would operate electrically as part of the Florida interconnected group and therefore required that Gainesville:

> "* * * own or secure from others generating capacity equal to or greater than 115 percent of the City's estimated annual peak hour demand. Under finding (7)(c), Gainesville must maintain ready reserves up to a limit of 15 percent of the City's estimated annual peak hour demand and up to a limit of 10 percent of that demand for spinning reserves. In the light of current reserve practices being followed by Florida Power and other members of the Florida Operating Committee, these requirements will insure that Gainesville discharges its utility service obligations to provide sufficient generating capacity and

resources, installed and operating, to supply the needs of its utility consumers." (R. I 360-361).

Also pointing to schedules of charges provided,[9] the Commission went on to comment that these charges

> "* * * will adequately compensate both Florida Power and Gainesville in providing the services. The reserve capacity which we are requiring Gainesville to maintain will assure that Gainesville does not unduly burden Florida Power. The record in this case demonstrates that Gainesville will place no disproportionate burden or reliance on the facilities of the Corporation and thus should not be penalized either in terms of greater reserve capacity requirement than that carried by the other systems in the coordinating area or in terms of a demand charge." (R. I 363).

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[9]With the exception of the claimed standby charge, the Commission adopted, generally with the parties' acquiescence, the Examiner's recommendations as to the compensation to be paid for services to be provided under the interconnection with minor changes not here relevant (R. I 361-362). With reference to the emergency service, the Commission provided (R. I 377-378):

> "(e) Emergency Electric Service: Emergency electric service provided for a period of less than 60 minutes shall be treated as Inadvertent Energy Transfer * * *. Such service, if provided beyond the end of a 60-minute period shall be treated as Scheduled Electric Service * * *.
>
> "(g) Payments: Except for payments related to Economy Energy transaction, * * *, payments shall be as follows:
>
> "(1) Inadvertent energy, if not returned in kind, shall be paid for upon 30 days' notice given by the delivering party at the rate of 4 mills per kwh, or the seller's average fuel cost plus 10 percent of such cost, whichever is less at the point of interconnection.
>
> "(2) Scheduled Electric Service shall be paid for at the rate of $.05 per kw per day for each kw of actual or scheduled demand, whichever is greater, if paid for by Gainesville or whichever is smaller if paid for by Florida Power, plus 4 mills per kwh or the Seller's average fuel cost plus 10 percent of such cost, whichever is less at the Archer Substation."

Accordingly, since "the cost of providing [the] services and facilities and the appropriate charges therefor have [thus] equitably been determined after a careful analysis and apportionment of the burdens and responsibilities of each party" (R. I 365), the Commission refused to adopt either the $3.08 standby charge proposed by Florida Power or the 50-50 split of benefits recommended by the Examiner. This result, the Commission further indicated, is reinforced by the additional consideration that not only would Florida Power's proposed charge "discourage future coordinated planning and operation" (R. I 365), but Florida Power had failed "to include a comparable charge in any of the contracts voluntarily negotiated with the other systems with which it is interconnected." (R. I 367). Thus, it noted that Florida Power "plainly bears the burden of justifying an apparently discriminatory imposition in this one instance" (R. I 367), a burden which it had not carried. However, the Commission commented (R. I 365):

> "If we were to appraise Florida Power's request for an annual standby charge in terms of a 'splitting of the benefits' test, this record shows that the proposed intertie will afford both parties opportunities to take advantage of substantial and important benefits: electrical operating benefits, and corporate financial savings."[10]

On appeal, the Court of Appeals agreed that the interconnection "is 'necessary or appropriate in the public interest' and the interconnection will not put an 'undue burden * * * upon' the facilities of Florida Power or 'impair its ability to render adequate service to its customers' " (R. II 501). However, the Court held that the terms of the interconnection prescribed by the Commission "do not adequately satisfy the statutory requirements [fn. omitted] because they do not provide Florida Power with the 'reimbursement reasonably due' it" (R. II 501). In this regard, the Court

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[10]The Commission's opinions elaborated upon these benefits (R. I 366-368, 411-412) as discussed *infra*, pp. 31-37.

accepted Florida Power's contention "that the Commission's policy of looking to the proportionate burdens that each system places upon the interconnected system networks instead of the benefits received as a result of the particular interconnection is inconsistent with the statutory authority to compel the interconnection" (R. II 489-490) and further held (R. II 503):

> "The Commission's policy of proportionate utility responsibility really works only one way. The small system received high benefits and, because of its size, no real obligations. The large system, however, receives no benefits but does incur real, substantial responsibilities. Such imaginary equity is not reasonable compensation."

Accordingly, the Court declined to "enforce" this portion of the Commission order and remanded the case to the Commission to provide "reasonable compensation" (R. II 503).

SUMMARY OF ARGUMENT

In declining to enforce the Commission's determination of the "compensation * * * reasonably due" Florida Power under Section 202(b) on the basis of proportionate utility responsibility, the Fifth Circuit erred in failing to recognize that that determination was primarily for the Commission with the Court's function necessarily limited. The express language of Section 202(b) clearly manifests a Congressional intent to vest responsibility in the Commission to give content to the statutory language and to determine the policy to be applied in formulating the terms of interconnections directed under that Section. Also, any meaningful determination with respect to such policy has its roots in the complex economics and technology of the electric power industry, as to which the Commission is expert and the courts are not.

The Court of Appeals' error is compounded by the fact that the views which it thus rejected in substitution for those

of the Commission conflict with established principles and operate to frustrate the Act's purposes. In contrast to the ruling below that Section 202(b) requires an allowance for benefits bestowed, it is settled that the Federal Power Act leaves the Commission free to select its own method of determining rates and further that to the extent that that Act contains any preference, it would be in favor of cost to the exclusion of value and other non-cost considerations. Moreover, unlike the approach of the Fifth Circuit, the Commission's approach is in accord with the Act's objective of "assuring an abundant supply of electric energy * * * with the greatest possible economy" (Section 202(a), App., *infra*, p. 39). It does not penalize a utility for being the last one to join an interconnected network; here, the last to join the Florida power pool.[11] It facilitates, rather than creates obstacles to, the expansion of the interconnections and coordination needed, particularly by small electric systems, in order to reduce costs and to enhance reliability at this time of developing shortages in electric capability and concomitant increasing threats of "brownouts" and "blackouts."

Further, the Court of Appeals' assertion that the Commission's policy of proportionate utility responsibility "really works only one way" ignores both the actualities of the electric power industry and the Commission's express findings, which, being supported by substantial evidence, are conclusive. Contrary to the claim of the Court below that the Commission's policy subjects only the large utilities to "real substantial responsibilities," the burdens imposed under the Commission's order are primarily upon Gainesville. All the costs of accomplishing the interconnection are to be borne by Gainesville and none by Florida Power. The Com-

[11] Although not formally entitled a "power pool," the interconnected electric operations of 5 major Florida utilities, coordinated by the Florida Operating Committee, can in fact be considered an operating power pool, and is so referred to hereafter. See pages 4-5, *supra*.

mission's order does not require the providing of any firm service or services by Florida Power; it does not impose any reserve obligations upon Florida Power although it does require Gainesville to maintain or obtain certain minimum reserves required by the criteria and needs of the Florida power pool; and it provides a schedule of rates covering the various services across the connection.

The only charge here at issue is one sought by Florida Power and ordered by the Court solely for the fact of interconnection—irrespective of actual services performed. Such a charge is unjustified and unique for the service which the Commission directed Florida Power is in fact to provide. The mutual emergency service as provided by the Commission and as sought by Gainesville is not firm service and is to be provided only on a when, as, and if available basis, just as it is provided among the other participants in the Florida pool. Such non-firm service is wholly adequate to Gainesville's needs.

The Fifth Circuit's further assertion that large systems do not receive any benefits under the Commission's policy is likewise inaccurate, both as it relates to the electric power industry generally and as it pertains to the Florida Power-Gainesville situation specifically. The evidence of record amply supports the Commission's express findings that the interconnection will make available to Florida Power as well as to Gainesville "substantial and important * * * electrical operating benefits and corporate financial savings" (R. I 365).

ARGUMENT

As part of its order directing Florida Power to interconnect with the facilities of Gainesville in this case, the Commission determined that since Florida Power was not bearing any part of the costs of the interconnection and was to be paid for services rendered, Section 202(b)'s requirement of "compensation * * * reasonably due" would be satisfied by requiring Gainesville to bear its fair share of responsibilities

and burdens of the interconnected systems in accordance with Florida pool criteria and needs. By applying this policy of proportionate utility responsibilities under which the responsibilities of interconnected operation are shared on the basis of "the proportionate burden each system places upon the interconnected system networks, not the benefits each expects to receive" (R. I 364-365), the Commission avoided the imposition of "economic penalties [upon Gainesville] for being the last one on the interconnected network" (R. I 358).

In declining to enforce this portion of the Commission's order for failure to provide compensation for benefits bestowed as well as reimbursement for costs incurred, the Court below committed multiple error. It erred in failing to defer to the Commission on matters which fall primarily within the responsibility of the Commission by virtue of Congressional direction and Commission expertise. It erred in insisting upon the inclusion of compensation for benefits bestowed as part of the "compensation * * * reasonably due" under Section 202(b). And it erred in undertaking to make findings of fact with respect to the burdens and benefits resulting to Florida Power from the interconnection independently of, and contrary to, those which the Commission made on these very matters with ample support in the record.

I.

THE COMMISSION'S POLICY OF PROPORTIONATE UTILITY RESPONSIBILITY DOES NOT EXCEED ITS DISCRETION

A. The Determination of "Compensation * * * Reasonably Due" Within Section 202(b) Is Primarily for the Commission.

Section 202(b) expressly provides that as part of an order directing a public utility to interconnect its transmission facilities with the facilities of others–

> "The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."

This language, we submit, clearly manifests the Congressional intent to vest *in the Commission* the primary responsibility for determining the policy to be followed in formulating the terms of the interconnection as well as the terms themselves. This is particularly so since, as shown below, any meaningful decision as to the construction to be given this language and the appropriate policy to be followed thereunder has its roots in the complex economics and technology of interconnected electric power operations and it is the Commission, not the Courts, which is the expert in these matters by virtue of day-by-day exposure and experience.

In these circumstances, the Commission's discretion is very broad and judicial function in reviewing such Commission determination is limited. It is well settled that an administrative agency has great leeway—to be disturbed on judicial review only rarely—in construing statutory terms in laws the administration of which has been delegated to it by Congress. See, *e.g.*, *SEC v. New England Electric System*, 390 U.S. 207, 211 (1968); *SEC v. New England Electric System*, 384 U.S. 176, 185 (1966); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Comp. Commission v. Aragon*, 329 U.S. 143, 153 (1946); *NLRB v. Hearst Publications Inc.*, 322 U.S. 111 (1944). As this Court stated in affirming the NLRB's determination that the newsboys there involved were "employees" within the Labor Relations Act in the *Hearst* case (322 US at 130-131):

> "* * * Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries * * * The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor prac-

> tices have been committed, 'belongs to the usual administrative routine' of the Board [fn. and citations omitted].
>
> * * * * *
>
> "* * * where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Worker's Act [fn. omitted] that a man is not a 'member of a crew' (South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251) or that he was injured 'in the course of his employment' (Parker v. Motor Boat Sales, Inc., 314 U.S. 244) and the Federal Communications Commission's determination [fn. omitted] that one company is under the 'control' of another (Rochester Telephone Corp. v. United States, 307 U.S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."

Similarly where the matter relates to a question of appropriate policy to be followed in administering a regulatory statute, agency discretion again is given broad leeway and accordingly, judicial review is necessarily limited. For example, as this Court stated in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) in rejecting an attack upon the FCC's Chain Broadcasting Regulations (*Id.* at 224):

> "The Regulations are assailed as 'arbitrary and capricious'. If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in Board of Trade v. United States, 314 U.S. 534, 548, is relevant here: 'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.'

> Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise."

And in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) involving the validity of rates fixed by the FPC for gas produced by independent producers from the Permian Basin, this Court's decision was again guided by deference to the agency's delegated responsibility and expertise (*Id.* at 767):

> "* * * we have heretofore emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' FPC v. Hope Natural Gas Co. [320 U.S. 591 at 602]. * * *
>
> "* * * No other rule would be consonant with the broad responsibilities given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests."[12]

As we will now show, the Court below exceeded permissible limits and invaded an area delegated to the Commission when it injected its own views in preference to the Commis-

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[12]See also *SEC v. Chenery Corp.*, 332 U.S. 194, 207, 209 (1947); *SEC v. Central–Illinois Securities Corp.*, 338 U.S. 96, 127 (1949).

sion's policy of proportionate utility responsibility for determining the proper measure of compensation due under Section 202(b).

B. The Commission's Policy Accords With and Furthers The Act's Purposes and Objectives

By setting aside the Commission's order for failure to include in the "compensation, * * * reasonably due" under Section 202(b) an allowance for benefits bestowed as well as reimbursement for costs incurred, the Court below has in effect ruled that Section 202(b) contains a *mandate* requiring that the compensation provided include an allowance for those benefits. Such a result clearly conflicts with long-established principles and operates to frustrate the Act's objectives and purposes.

It has been established at least since 1944 when the Court issued its decision in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) that (1) the Federal Power Act and its companion, the Natural Gas Act, do not prescribe any specific method for determining just and reasonable rates thereunder and that (2) the Commission may properly ignore value and other non-cost considerations in determining such rates (*Id.* at 601):

> "* * * Rate-making is indeed but one species of price fixing. * * * The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. * * * It does, however, indicate that 'fair value' is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. * * *"

See, also *Permian Basin Area Rate Cases, supra*, at pp. 792-795.

Indeed, there has evolved with the passage of time what might be described in effect to be a presumption favoring the use of cost to the exclusion of value or other non-cost considerations. Thus in *City of Detroit, Michigan v. FPC*, 230

F.2d 810 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 829 (1956) where the Commission undertook to abandon cost completely in favor of value (i.e., field price) as a measure for fixing rates for pipeline produced gas, the Court of Appeals set the Commission's order aside, ruling (*Id.* at 818-819):

> "* * * though we hold [the conventional rate base] method not to be the only one available under the statute, it is essential in such a case as this that it be used as a basis of comparison. It has been repeatedly used by the Commission, and repeatedly approved by the courts, as a means of arriving at lawful–'just and reasonable'–rates under the Act. Unless it is continued to be used at least as a point of departure, the whole experience under the Act is discarded and no anchor, as it were, is available by which to hold the terms 'just and reasonable' to some recognizable meaning."

Plainly, therefore, there is *no* mandate requiring the use of value or benefits, as distinct from costs, in determining "compensation * * * reasonably due" under Section 202(b). To the contrary, not only is there no mandate either way, but established principles manifest a preference for the Commission's use of cost as against the benefits or value concepts which the Court below would reject. Under the principles discussed earlier, this should be the end of the matter. As this Court stated in *Udall v. Tallman*, *supra*, quoting from *Aragon*, *supra* (380 U.S. at 16):

> "'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.'"[12a]

Further undermining the holding below is the fact that the Commission's approach–rather than that of the Court below–accords with, and furthers, the Act's purpose and objectives. In the first place, Section 202(a) of the Act imposes upon the Commission the responsibility "* * * of assuring an abundant supply of electric energy throughout

[12a] See also, *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968).

the United States *with the greatest possible economy* and with regard to the proper utilization and conservation of natural resources * * *." (See App., *infra*, p. 39.) Patently, including allowance for benefits bestowed in addition to reimbursement for costs incurred in the "compensation * * * reasonably due" under Section 202(b) means that the rates of the paying utility for the power sold by it would be higher than they otherwise would have to be if the compensation required to be paid did not include an extra allowance for benefits. On the other hand, of course, the utility supplying the power is not hurt by the exclusion of that allowance because the inclusion in "compensation * * * reasonably due" of all costs incurred operates to keep such supplier whole.

In the second place, the Commission's policy operates so that each participant in an interconnected operation bears its proportionate share of the operating responsibilities of the interconnected network with the result that there is no penalty for being the last one on the interconnected network. In contrast, the approach of the Court below of ignoring concepts of proportionate responsibilities would exact from the last to join a proportionally greater contribution than that required from those already participating in the interconnected system. To permit such an imposition merely because one is the last to join is unfair, unwarranted and contrary to the Act's purpose of encouraging interconnection. Gainesville should be able to join the Florida pool on the same basis as the five current members, by bearing no more than its proportionate responsibility for operating reserves under the uniform formula set by the Operating Committee.

Finally, the allowance of an additional amount for benefits bestowed, as the Court below would require, would obviously create obstacles to meaningful interconnections and coordination, particularly between small systems and large systems, which would not exist under the Commission's approach. As the Commission pointed out (R. I 365):

> "* * * the specific type of demand charge requested by Florida Power, namely, the imposition of a charge based upon the size of Gainesville's largest generating unit, would discourage future coordinated planning and operation by reducing the economic incentive for Gainesville to install larger and more efficient generating units. Without such a demand charge, Gainesville could participate more fully in coordinated planning including staggered construction with Florida Power and other systems in Florida to the mutual benefit of all such systems."[13]

The requirement by the Court below would thus have a deterrent effect upon the Commission's efforts to foster expanded interconnection and coordination as a means of reducing the cost, and enhancing the reliability, of electric service.

The sanctioning of such a deterrent is especially to be avoided at this time because of the developing shortages in electric capacity and the concomitant increasing threat of "brownouts" and "blackouts." It is also to be avoided because it is becoming increasingly difficult and uneconomic for the smaller systems to continue to operate in isolation, and interconnection and coordination with other systems are virtually mandatory to assure their continued existence as viable entities.

According to the Commission's National Power Survey (1964), p. 267, *et seq.*, not only are there literally hundreds of relatively small systems operating in isolation without any interconnection with any other system, but even where the small systems are interconnected with other and larger systems, the relationships between the two systems are fre-

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[13]This is so because imposing a substantial charge measured by the size of the largest unit tends to discourage the construction of larger, more efficient units—a major purpose of interconnection and coordination (R. II 432).

quently very limited, and there is an absence of the cooperation necessary to achieve the benefits of full coordination. In addition, it is repeatedly noted throughout the Survey (particularly, p. 170, *et seq.*) that interconnection *and* full coordination are highly desirable and to be fostered at all levels and at every opportunity since they open the way for many and valuable benefits, not the least of which arise from reduced overall generating requirements and lower unit costs achievable through the planning and construction of new facilities. As the Commission stated in *Crisp County Power Commission v. Georgia Power Co.*, 42 F.P.C. 1183, 1187 (1966):

> "* * * The electric power industry is continuing its historic trend toward larger units in order to attain the economies inherent in large-scale production of energy. The industry also has accelerated the pace of its attempts to coordinate and to reduce reserve capacity in order to utilize more efficiently its capital investment and improve bulk power supply reliability. In this context, the disadvantages of small isolated systems which generate all of their own energy and rely upon their own limited resources, have become more evident and more critical with regard to the cost and reliability of service. The ever-widening gap that technology has created between large interconnected systems and isolated systems, in the economical use of capital and the efficient production of energy, threatens the survival of many small systems. Unless isolated systems can enter into coordination agreements with their larger interconnected neighbors, their outlook appears bleak, indeed."

In this regard, it should be pointed out that the foregoing is not intended to suggest that consideration of benefits is never relevant. To the contrary, we fully recognize that consideration of benefits is critical to the determination whether to require interconnection. Cf. R. I 358, *et seq.* But that is different from the problem presented in this case. The statutory standard for ordering interconnection

under Section 202(b) is whether "such action is necessary or appropriate in the public interest" (see App., *infra*, p. 39); obviously the existence and magnitude of the net benefits resulting from the interconnection are highly relevant under that standard. On the other hand, the provisions as to the payments to be made once the interconnection is ordered are governed by the entirely different language of Section 202(b) relating to the compensation set out *supra*, p. 15.

II. THE DECISION BELOW RELIES ON ASSERTIONS WHICH ARE INCONSISTENT WITH THE FINDINGS MADE BY THE COMMISSION AND SUPPORTED BY SUBSTANTIAL EVIDENCE

In further support of its rejection of the Commission's policy of proportionate utility responsibility, the Court below asserts that that policy

> "* * * really works only one way. The small system receives high benefits and, because of its size, no real obligations. The large system, however, receives no benefit but does incur real, substantial responsibilities. Such imaginary equity is not reasonable compensation." (R. II 503).

Such assertions not only consist of *a priori* pronouncements without any relation to the actualities of the generation and distribution of electric power and energy generally;[14] they are contrary to the express findings of the Commission, which, as we show below, are fully supported by substantial evidence in the record. These assertions, therefore, violate the settled principle exemplified by the provision in Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), that "[t]he findings of the Commission as to fact, if supported by substantial evidence, shall be conclusive."

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[14] Regardless of the disparity in the sizes of the two utilities, the intersystem benefits and burdens are limited by the capacity of the facilities interconnecting the two systems.

A. The Commission's Order Does Not Subject Florida Power to Any Real or Uncompensated Burdens

In connection with its claim that the Commission's policy subjects only the large utilities such as Florida Power to "real substantial responsibilities," the Fifth Circuit states that (R. II 502):

> "* * * although there is no direct cost, Florida Power, really its customers, will bear a substantial burden. They must bear the allocated fixed cost represented by the added obligation imposed under the terms of the ordered interconnection."

There is no basis or justification in the record in this proceeding for such a claim of an "added obligation." To the contrary, the obligations imposed by the Commission's order are entirely upon Gainesville, and the net effect of the order is to *relieve* Florida Power of obligations to which it otherwise would be subject under the rules of the Florida power pool.

To begin with, it is clear on the face of the Commission's order—and Florida Power does not contend to the contrary—that *all* the costs of accomplishing the interconnection are to be borne by Gainesville and *none* of these costs are to be paid by Florida Power (R. I 361, 368). The Commission's order is also clear that it does not require Florida Power to provide any firm service or services (R. I 363, fn. 4). Thus, although the interconnection would be available as a means of providing a variety of services (R. I 358-359), the Commission has not imposed *any* firm obligation upon Florida Power with respect to the providing of any of these services; therefore, it imposes no "added obligation." Rather, the Commission expressly made it clear that the extent to which the interconnection would be used was a matter for decision by the parties (R. I 359).

Moreover, in line with its recognition that "appropriate compensation [may be] afforded either through service exchanges or financial payments" (R. I 358), the Commis-

sion prescribes substantial obligations or "costs" for Gainesville. Thus, as noted, *supra*, p. 8 the Commission's order imposes an installed reserve obligation upon Gainesville requiring it to own or provide generating capacity resources equal to or greater than 115 percent of its estimated annual peak-hour demand (R. I 360, 376). Similarly, Paragraph 7(c) imposes an operating reserve obligation on Gainesville up to a limit of 15 percent of its estimated annual peak-hour demand for ready reserves and up to a limit of 10 percent of that demand for spinning reserves in accordance with Florida pool criteria (R. I 360-361, 377).

Not only does the Commission's order not impose any new installed reserve obligation upon Florida Power, but the requirements imposed upon Gainesville redound to the advantage of Florida Power. All of Gainesville's installed generating resources become integral components of Florida Power's resources insofar as Florida Power's relations with its interconnecting utilities are concerned, and therefore Gainesville's installed reserve capacity becomes an additional resource to Florida Power without cost. The effect of the requirements of Paragraphs 7(a) and 7(c) of the Commission order is that the reserves required of and supplied by Gainesville also are available as operating reserves of the Florida pool and Florida Power *without* cost to Florida Power and *without* imposing any additional generating reserve obligation on Florida Power. See also *infra*, pp. 32-35. In either case, the reserves which Florida Power must provide to conform to pool requirements (and thus at its own expense) are in fact reduced by the tie-in of Gainesville's reserves.

Finally, the Commission's order expressly provides a schedule of rates compensating Florida Power for every service which Florida Power may be called upon to provide across the interconnection. As recognized by Florida Power in its Initial Brief before the Fifth Circuit (at pp. 19-20):

> "The Commission prescribed compensation for every conceivable service across the connection except emergency backup service."

Even with respect to the latter, Florida Power is to be paid for all the emergency electricity provided by it to Gainesville. Indeed the Commission-prescribed schedule of payments requires Gainesville to pay, in addition to an energy charge, a demand charge of $.05 per kw per day if emergency service is provided for more than 60 minutes (R. I 377-378).

Despite this detailed and comprehensive schedule of rates, Florida Power contends that the Commission erred in failing to include a standby charge for the cost of facilities which it assertedly will have to keep available at all times to provide such emergency service. Florida Power contends (Br. in Opp. p. 10) that the emergency service required under the Commission's order imposes upon it the obligations of:

> "* * * furnishing of capacity in a state of readiness capable of supplying instantaneously at any instant of the day or night the energy required to protect against loss of a system's largest generator. Emergency backup service is the fire department. It is the equipment installed and in a continuous state of readiness to meet any generating deficiency. Gainesville wants to rely at all times upon Florida Power's backbone transmission network for emergency backup service whether or not energy is being transferred. Emergency energy is the 'water' used to put out the 'fire.' The Commission ordered Gainesville to pay for the 'water' but relieved Gainesville from all responsibility to contribute to the cost of the fire department."[15]

The first difficulty under this argument is that adoption of Florida Power's proposed charge would be unique for

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[15]The fire department analogy is plainly inapplicable as is shown in the text. Moreover, it should be noted that Florida Power's backbone transmission network—part of "the fire department"—serves the same function for Florida Power when Gainesville is called upon to deliver emergency service into Florida Power's system. And Gainesville bears the entire cost of transmission on its side of the interconnection necessary to deliver electricity on either side thereof.

the service which Florida Power is to provide under the Commission's order. The industry operates on the general principle that each party to an interconnection will maintain an adequate level of installed reserve capacity and therefore will be entitled to "emergency assistance" from the other party without being subject to a standby charge. Such, indeed is the situation of the Florida pool, of which Florida Power is a member. As indicated by the Commission (R. I 367), no such charge is made against any members of the Florida pool by any other member (see Exhibits 74, 80, 86, 90, 91, 92, 93).

The decision below refers to "instantaneous" emergency service, a concept that Florida Power emphasizes in its brief. A properly operating pool, within the limits of the connected spinning reserves, responds automatically and almost instantaneously to changes in loads or generating capacity anywhere on the interconnected system. Thus such "instantaneous" response to emergencies is normal between Florida pool members, and will be extended to the Gainesville-Florida Power tie. It is the pool, with its apportionment of spinning reserve obligations to each member, large or small, that assures within limits "instantaneous" emergency service between its members. The Commission's order contemplates no more "instantaneous" emergency service for Gainesville than would be available in similar circumstances to other members of the pool.

The second and more important difficulty with this argument of Florida Power is that it grossly overstates the nature of the obligation which the Commission imposed, and which Gainesville sought, with regard to emergency backup service. As pointed out *supra*, p. 24, the Commission in its order took pains specifically to emphasize that its order imposes no obligation upon Florida Power "to provide any specific *firm* power service" to Gainesville (R. I 363, fn. 4). Since the Commission's disavowal applies to emergency backup service as well as any other service which Florida Power might provide under the Commission's order, Florida Power's obligation to provide emergency service to Gainesville is only on a when, as, and if available basis. In other words,

the Commission's order requires neither "the furnishing of capacity in the state of readiness capable of supply instantaneously at any instant of the day and night the energy required to protect against loss of [Gainesville's] largest generator" nor the maintenance of equipment "in a continuous state of readiness to meet any generating deficiency" (Br. in Opp., p. 10).

The Commission's requiring of emergency backup service only on an "as available" basis accords entirely with Gainesville's request repeatedly made plain in the record. Thus, Gainesville's witness Benson said of Gainesville's proposed contract that (Exhibit 4, Schedule 5, page 3):

> "* * * Gainesville will expect from and rely upon Florida Power to furnish, during any period of emergency on the system of the City, any power supply capabilities then available to Florida Power *in excess of its requirements for its own load and any firm capacity obligations to others.*" (Emphasis supplied)

Similarly, in explaining his disagreement with the $3.08 standby charge sought by Florida Power, Mr. Benson reiterated that (R. II 466):

> "For one thing, it [Florida Power's proposed charge] is based upon a reservation of transmission capacity, but *Gainesville is not seeking a firm service obligation.* Therefore, *no capacity reservation is required.*" (Empahsis supplied)

And again, in response to the specific query of Florida Power's counsel on cross-examination (R. II 472):

> "* * * will not this connection impose upon Florida Power the burden, obligation, or whatever you want to call it, of providing emergency backup service to Gainesville in the amount of its largest unit at all times."

Mr. Benson answered (*Ibid.*):

> "A. No, sir. *The provision for emergency service does not impose a firm service obligation on the part of Florida Power Corporation* or upon Gainesville. It is upon an implicit basis of there being *no reservation of capacity,* of there being *no investment*

incurred by Florida Power Corporation for the interconnection." [16] (Emphasis supplied)

In this regard it should be noted that the obligation of the members of the Florida pool to provide emergency service to the other pool members is similarly on such a when, as and if basis. Yet, despite this limitation, the pool concept operates successfully to provide a coinsurance against generator outages for its members. Each member of the Florida pool, from Florida Power & Light Company, the largest,[17] to the City of Orlando, the smallest,[18] provides its share of the insurance capacity in accordance with a formula which takes into account the burden placed upon the pool by each member and fixes the total reserve required and the proportionate share of each on that basis. And the reserves thus prescribed, together with any other capacity available at the moment—without any additional firm obligation vis-a-vis emergency service—provide the requisite protection against outages on the systems of each of the participating companies.[19]

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[16]This absence of any firm obligation upon Florida Power to provide emergency service to Gainesville distinguishes the present situation from those referred to by Florida Power at pages 14-16 of its Brief in Opposition. In each of the situations cited by Florida Power including those involving the Southeastern Power Administration there was a firm obligation to provide emergency service (see, e.g., *United States Department of the Interior, Southeastern Power Administration*, 39 F.P.C. 992 (1968); accordingly, a standby demand charge was not only appropriate, but required under standard rate-making principles.

In this regard, there should be noted the Commission's requirement that Gainesville pay, in addition to an energy charge, a demand charge of $.05 per kw per day if emergency service is provided for more than 60 minutes (R. I 377-378). On a monthly basis, this would amount to $1.50 per kw.

[17]Total capacity 3648 mw, largest unit 432 mw, peak load, 2529 mw.

[18]Total capacity 319 mw, largest unit 213 mw, peak load 180 mw. 1965 Data: from Exhibits 78 and 96, sheet 5.

[19]See Florida Operating Committee Minutes, Exhibit No. N-132, and pages 4-5, *supra*.

Plainly, therefore, not only is the providing of emergency service by Florida Power to Gainesville on a comparable when, as and if basis, likewise adequate for Gainesville, but the Commission's prescription of reserves for Gainesville in conformance with the rules of the Florida pool constitutes a more than sufficient *quid pro quo* for Florida Power. See *infra*, pp. 32-35.

In any case, Gainesville will need emergency service only in the remote contingency of outage of generating capacity at a time when the customer load exceeds remaining operating capacity. In Gainesville's case, the chances of this occurring are extremely small; industry statistics show that units such as those of Gainesville have extremely low forced outage rates (R. I 220; Exhibit 73, Sheet 3). Indeed, Gainesville itself has in fact experienced virtually no forced outages for the 1956-1965 period (Exhibit 73, Sheet 1).[20] The combined probability that Gainesville will require emergency assistance at a time when the Florida pool does not in fact have available reserve capacity, is so minute as to be regarded as *de minimis* for design purposes.

Finally, Florida Power's argument ignores the fact the emergency service is mutual, so that Gainesville stands by to provide emergency assistance up to the 60 mw of interconnecting capacity to assist Florida Power in any system, particularly disturbances affecting its system in the Gainesville vicinity. This is discussed in the following section which deals with the benefits the Commission recognized as flowing to

[20] As shown on Sheet 2 of Exhibit 73, 3 of Gainesville's then 5 units suffered no forced outages during the period covered; of the other two, one, Unit 6 with a 16,500 kw capacity, suffered a 30-minute forced outage in 1959 due to gas pipeline company failure and the other, Unit 7 with a 24,500 kw capacity, suffered two 15-minute outages in 1964, one due to relay failure and the other due to forced draft fan starter failure. This is confirmed by the Staff's loss of load studies which show that the probability of load exceeding available generation on the Gainesville system (R. II 453-454, 461, Exhibit 98) is only 0.000043—about .37 hours, or 23 minutes, per year.

Florida Power. In any event, Gainesville will be subject to the same, if not greater, burdens as Florida Power, whatever they may be, and in addition Gainesville furnished the interconnection facilities at no cost to Florida Power.

B. The Commission's Finding that Florida Power Could Benefit Substantially from the Interconnection Is Supported by Substantial Evidence.

Likewise without substance or basis is the assertion of the Court below that under the Commission's policy of proportionate responsibility, the large system does not receive any benefits.

To begin with, this assertion is inaccurate as it relates to the electric power industry generally. Most large systems, such as Florida Power, obviously do not consist entirely of units with capacities of 875 mw or even 500 mw, all in close proximity to the company's markets. To the contrary, large systems typically have many small units and their markets are spread over a wide geographical area. Plainly, a large system in such circumstances may well benefit substantially from interconnection with a smaller system, which can be helpful in a variety of ways to the larger system. As the Commission noted in the comparable situation of a small system seeking interconnection with a large system involved in *Crisp County Power, supra,* 42 F.P.C. at 1188:

> "* * * there will often be situations where the smaller system can bring to the coordinated interconnection additional capacity and energy resources at costs significantly lower than would otherwise be available, as well as adding to the reliability of the larger system."[21]

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[21] See also R. II 49 discussing how participation in a power pool has been beneficial both to Orange and Rockland Utilities, Inc., with a 1965 annual peak of 255.3 mw and to Consolidated Edison Company of New York, with a 1965 annual peak of 5,710 mw, nearly 25 times that of Orange and Rockland. See also R. I 89; Exhibit 99.

The Court's assertion is also inaccurate as it pertains to the Florida Power-Gainesville situation here before this Court. Indeed, the Commission specifically found, on the basis of substantial evidence in the record, that the interconnection will afford Florida Power, as well as Gainesville "substantial and important benefits: electrical operating benefits and corporate financial savings" (R. I 365).[22]

(a) *Electrical Operating Benefits*

Turning first to the electric operating benefits which the interconnection would make available to Florida Power, the record shows that the interconnection will provide an additional energy source and thereby improve the reliability of service furnished by Florida Power in the Gainesville area where Florida Power has over a thousand customers but no generating plant of its own. As a matter of fact, Gainesville is the large system and Florida Power the small one within the Alachua County area. Thus, Gainesville's power plant is only 15 miles from Florida Power's Archer Substation and hence would be less exposed to lightning, storm or outage for other reasons than the energy sources

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[22] The attempt of the Court below to brush aside the Commission's findings of benefits as tentative only and hence as not "protected by the umbrella of the substantial evidence test" (R. II 502, fn. 20) misreads the Commission's opinions. The only thing tentative about these findings was not the findings, but their relevance in light of the Commission's policy relative to the determination of compensation (see R. I 365). As to the Commission's findings themselves, they are both firm and specific, as is readily apparent from the Commission's opinions (R. I 365-368, 411-412).

In this regard it should be noted that this ground was not raised in Florida Power's application for rehearing (R. I 381-408). The ruling of the Court below, accordingly, violates the principle prohibiting a court, upon review of an agency decision, from considering grounds not raised on rehearing. Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b); *Panhandle Eastern Pipe Line v. FPC*, 324 U.S. 635, 649 (1945); *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 498 (1955).

used by Florida Power to serve that area. This is particularly so since Florida Power's closest generating source is 75 transmission miles away; its next closest is 80 transmission miles away; and of the three energy sources connected to its load in the Gainesville area, two serve other loads and could be vulnerable to outage (R. I 366, 414; see also R. I 221-222).

Still another such benefit stems from the facts that (1) 16 of Florida Power's 24 generating units have a capacity less than 50 mw (Exhibit 31) and (2) these 16 units include "a small hydro plant of 8 mw; 7 old inefficient low pressure units with a combined maximum dependable output of 88 mw on cold standby used only to meet short-term winter peaks, with two units having a combined capacity of 65 mw to be added to cold standby by 1970 or 1971" (R. I 315).[23] Consequently, Gainesville's ability, with its quick starting, highly reliable generating units (R. I 35-38),[24] to deliver the full 60 mw of interconnecting capacity to Florida Power during most of the year obviously will improve Florida Power's ability to meet its peak obligations.[25]

In addition to improved reliability in these specific areas, the record shows that interconnection with Gainesville would operate to improve the reliability of Florida Power's system generally (R. I 366). Thus, the studies of Commission wit-

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[23]Certain units in "cold standby" require some 8 to 12 hours before they are capable of generating power (Exhibit 31).

[24]83% of Gainesville's plant is 8 years old or less and one unit is over 20 years old, whereas only 50% of Florida Power's steam capacity is in units 8 years old or less and 8.7% is over 20 years old (R. I 220). Moreover, Gainesville subsequently installed three gas turbines with self-contained starting systems independent of external power which could provide valuable assistance to Florida Power and through it, to the Florida pool, in the event of a wide-spread power failure, such as that which occurred in the Northeast in 1965 (R. I 220).

[25]In addition, each system will be able to draw on the other's reserve capacity at any time of the year. In this regard, it should be noted that irrespective of the relative size of the two systems, the 60 mw capacity of the interconnection provides a ceiling upon the assistance each party can be to the other.

ness Savage show that without Gainesville and giving full effect to Florida Power's contractual arrangements for additional power supply,[26] the loss of Florida Power's largest unit at the time of its monthly peak demand would cause demand to exceed capacity on 19 occasions in the period 1967-1969; whereas the addition of Gainesville would reduce the number of prospective capacity deficiencies due to the loss of that largest unit to 12 (R. I 210-211; Exhibit 72).[27]

That the reliability of Gainesville's generating units is greater than those of Florida Power is further reaffirmed by loss of load studies submitted by Commission witness Braitman. These studies showed that the probability of load exceeding available generation on Florida Power's system (including its firm 200 mw purchase from Tampa) through forced outages is .0050 compared to a similar figure of 0.000043 for Gainesville (R. II 439, 461).[28] The inter-

[26]Florida Power had two contracts for outside power supply: one with Tampa Electric Company (Tampa) for 200 mw of capacity out of Tampa's steam-electric generating unit No. 6 (Exhibit 74), and the other with Southern Services, Inc., providing generally for seasonal exchange of 100 mw of capacity. The latter, however, was scheduled to be terminated as of September 15, 1969 (R. I 172). Subsequent to the close of the record, Tampa's Unit No. 6 was taken out of service as a result of a fire, with the consequent loss to Florida Power of the 200 mw capacity.

[27]Exhibit 70 shows that the generating facilities owned by Florida Power *alone* would be inadequate to serve the predicted loads from January 1967 through December 1969. As shown in that exhibit, if the largest unit on the Florida Power system were taken out of service during the time of peak monthly demand, Florida Power's remaining generating capability would be insufficient to meet customer requirements in 30 of the 36 months covered in that exhibit. This is due, in large part, to the fact that, as a member of the Florida Power pool, Florida Power is relieved of the need to have installed ready or spinning reserve capacity equivalent to the capacity of its largest unit. The capacity of Florida Power's ready reserve is about 55% that of its largest unit (R. I 214).

[28]Expressed in terms of hours (8760) per year, the studies show a probability that Florida Power's load would exceed available generation 43.8 hours (0.0050 times 8760) per year or about 120 times the .37 hours per year for Gainesville.

connection with Gainesville would improve Florida Power's reliability by reducing its loss of load probability to 0.0029 or to about 25 hours per year (R. II 438-439, 453-455, Exhibit 98).

The value of the assistance Gainesville could thus provide is enhanced by the further fact that Gainesville's generating units have a greater reliability than the larger units of Florida Power. Thus, the "forced outage data furnished * * * by Florida Power Corp. and by Gainesville show that the generating units of Gainesville are less susceptible to forced outages than those of Florida Power." (R. I 211; see also Exhibit 73).

(b) *Financial Benefits*

In addition to the electric operating benefits just discussed, the record, as the Commission found (R. I 365-366), shows that the interconnection would make substantial financial benefits available to Florida Power. Indeed, while the extent to which Florida Power in fact obtains these benefits from the interconnection depends on the extent to which Florida Power coordinates its activities with those of Gainesville, Commission witness Braitman summarized the financial benefits made available by the interconnection as follows (R. II 441-442):

> "Financial benefits to Florida Power stem from its ability to reduce capacity purchases from other neighboring systems or postponing generation installation by recognizing the excess capacity on the Gainesville's system that could be made available during emergencies. Economy energy benefits and spinning reserve benefits would be equally split between the parties. An additional benefit to Florida Power could involve a possible reduction in transmission investment in future years to serve its growing loads in the Gainesville area. If the coordination between these two systems is limited to the capacity reserve coordination reflected by Exhibit (NS-12) 81, Gainesville would receive more financial benefits than Florida Power only during the first few years

of the interconnection. If they coordinate their expansion plans, Florida Power benefits would equal or be greater than Gainesville's."

Thus, the evidence shows that the interconnection could serve to eliminate duplication in generating equipment, estimated as initially providing a gross saving in capital costs of $6,400,000 with $2,000,000 thereof going to Florida Power and the remainder going to Gainesville (R. I 61, 66). Also, there would be available substantial benefits and savings from the sale and exchange of economy energy, estimated to aggregate between $30,000 and $200,000 annually by 1969 (R. I 66-73, 87-88, 222).[29] These economy energy savings would, under the Commission's order (R. I 376-377) be split equally between Florida Power and Gainesville.

Further, Florida Power could benefit economically from the diversity between its peaks and those of Gainesville. The record shows that Gainesville's 1969 summer peaks would exceed its winter peaks by approximately 20,000 kw by 1969, when it could be made available on a firm basis to Florida Power at the base of its winter peak, whereas Florida Power could return 20,000 kw in the summer when its requirements have been significantly less than its winter peaks (R. I 61-62, 64-65, Exhibit 4); or Florida Power could pay a reasonable price for this firm winter capacity and save investment costs.

Likewise, there would be available substantial savings resulting from the reduction in ready and spinning reserves (R. I 63-64, 214-218). Thus the record shows savings to the Florida pool, if Gainesville is treated as a member, of

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[29] Economy energy is energy which it is more economical for Company A to purchase from Company B than to generate itself, because Company B's incremental cost for generating that energy is lower than that of Company A's. The economy energy savings discussed in the text is based on a detailed comparison, *inter alia*, of the load duration curves of Gainesville and Florida Power with the incremental costs of their principal generating stations, under various conditions including projected fuel costs (see R. I 66-73).

12,060 to 14,770 kw in ready reserves and 8040 to 9850 kw in spinning reserves, based upon 1967-69 data (R. I 214-215, Exhibit 76). If Gainesville operates as a satellite of Florida Power, and most of Gainesville's excess reserves are made available to Florida Power, this net reserve increase will vary between 46,300 and 74,400 kw for each month durings the period 1967-1969 (R. I 216-218, Exhibit 76; see also R. II 469-472, 487-488). This increase in reserves available to Florida Power could be used either to increase service reliability with respect to the loads already served by Florida Power or to increase the loads served without a commensurate increase in capacity costs and without impairing its present service reliability.

Furthermore, since Gainesville's generating facilities are far greater than its loads, and there is substantial load diversity between Florida Power and Gainesville, Florida Power could, with the interconnection, reduce its capacity purchases from other neighboring systems and postpone generation installation. Thus, an arrangement between Florida Power and Gainesville comparable to that of Florida Power and Orlando would permit Florida Power to postpone the installation of new generating facilities, thereby enabling it to save some $2,800,000 without incurring any purchased power cost (R. I 88-89, II 458). Such arrangement would have enabled Florida Power, in the words of the Commission expert witness Braitman, to

> "to sell capacity from its '72 unit to Gainesville, capacity that admittedly that first year or second year would be excess to their needs, in part, and would get revenue that they would never have. The combination of reductions in purchases from Tampa, sales from capacity that would normally never give them any revenue, and the postponements of a unit, provides an awful lot of dollars, more so than what I see in the benefits to Gainesville." (R. II 458)

CONCLUSION

For the foregoing reasons, this Court should set aside that portion of the judgment of the Court of Appeals which rejects the Commission's determination of the "compensation * * * reasonably due" under Section 202(b) of the Federal Power Act and direct the entry of an order affirming in full the order of the Commission.

Respectfully submitted,

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APPENDIX

Section 202 of the Federal Power Act, 49 Stat. 487, as amended, 16 U.S.C. 824a provides in pertinent part:

> Sec. 202 (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present it's views and recommendations, and shall receive and consider such views and recommendations.
>
> (b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities

with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.